

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Case No. 2010090026

JEFFREY G.

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

**DECISION**

The hearing in the above-captioned matter was held on March 7, 2011, at Tehachapi, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Kern Regional Center (KRC or Service Agency) was represented by Jeffrey F. Popkin, LCSW, ACSW, C-ASWCM, Associate Director. Claimant Jeffrey G. (Claimant or Jeffery) was represented by his parents, Cynthia S. and Ron S.<sup>1</sup>

The above-captioned matter was consolidated for hearing with two other cases, involving Claimant's siblings, as the cases involved common questions of law and fact. Those other cases are case numbers 2010070099 and 2010090979. However, a separate decision will issue in each case.

Evidence was received, argument was heard, and the case was submitted for decision on March 7, 2010.

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<sup>1</sup> Initials are used for the family surnames to protect Claimant's privacy.

## ISSUE PRESENTED

The issue in this case is whether Claimant is entitled to an eligibility assessment from KRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.<sup>2</sup>

## FACTUAL FINDINGS

1. Claimant is an 11-year-old boy (born August 19, 1999) who lives with his adoptive mother and her husband, and siblings within the Service Agency's catchment area. In 2010, his parents, acting on his behalf, sought eligibility from the Service Agency.

2. On August 4, 2010, KRC issued a Notice of Proposed Action, denying Claimant a diagnostic evaluation. (Ex. 5.) The reason for that denial was a claim by KRC that a review of records from various agencies showed that he did not have an eligible condition. Section 4642 was cited as legal authority for the action.

3. Thereafter, Claimant's parents filed a Fair Hearing Request. (Ex. 4.) While the request is dated August 10, it is shown as received by the Service Agency on August 31, 2010. Claimant's parents thereafter moved to consolidate this case with the two cases pending on behalf of his siblings, which motion was granted. All jurisdictional requirements have been met.

4. Claimant was adopted by his mother, who was then married to another man, after his birth. Claimant's birth mother used drugs and alcohol during her pregnancy. (Ex. 7, p. 4; Ex. 10, p. 1.) Although Claimant met some developmental milestones, there were delays in speech and language. (Ex. 7, p. 4.) He was able to make friends when he was a young child. (*Id.*)

5. (A) When Claimant was three years old, he was evaluated by Larry E. Gaines, Ph.D.; the evaluation was at the request of the North Los Angeles County Regional Center (NLACRC). At that point, Claimant was receiving Early Start services from that regional center, including speech therapy. (Ex. 10, p. 1.)

(B) Dr. Gaines issued his report in late October 2002.<sup>3</sup> He tested Claimant's cognitive abilities, using the Leiter International Performance Scale, Revised. The results indicated average intellectual ability. The Vineland Adaptive

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<sup>2</sup> All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

<sup>3</sup> The report states a date of evaluation as October 9, 2002, but the report is not otherwise dated. However, it shows receipt at NLACRC on October 23, 2002.

Behavior Scales were also administered, which yielded an adaptive behavior composite of 68, deemed mildly deficient.<sup>4</sup>

(C) Dr. Gaines diagnosed Claimant as suffering from Attention Deficit Hyperactivity Disorder (ADHD), and Developmental Coordination Disorder (Rule Out).

6. On or about October 25, 2002, NLACRC determined that Claimant was not eligible for services under the Lanterman Act, in that he did not have an eligible condition.

7. (A) In September 2009 Los Angeles County Department of Mental Health performed an AB 3632 Mental Health Assessment of Claimant. He was referred for that evaluation by his school district. The assessment report indicates that Claimant was then receiving special education services from his school district.

(B) The report notes that Claimant had been diagnosed as suffering from ADHD, but by history he had also been diagnosed with Bipolar Disorder and Fetal Alcohol Syndrome. It was noted that between his mother's reports and school records, it could be established that Claimant was having angry outbursts, which included threats to school personnel, and assaults on other students. He had symptoms of learning disabilities in terms of attention and visual processing. History indicated that his behavioral and emotional problems had been manifest since kindergarten, and had worsened over time. Psychotherapy and psychotropic drugs had had minimal positive effect. (Ex. 7, pp. 2-3.)

(C) At the time of the assessment, he was receiving the following medications: Concerta, Lithium, Imprimine, and Abilify.

(D) The assessment reported that an IQ test conducted in 2006, using a WISC-IV (Wechsler Intelligence Scale for Children, Fourth Edition), yielded a low average score. Academic testing from June 2006 revealed average skills in reading, math, and written language. (Ex. 7, p. 5.)

(E) It was reported that during the assessment process, Claimant displayed good eye contact and was cooperative during the interview. He appeared immature, talking in baby talk, even though he was eight years old. He exhibited problems with attention, being easily distracted. "Both his judgment and insight were impaired." (Ex. 7, p. 7.)

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<sup>4</sup> As the score is two standard deviations below the mean, it plainly evinces significant adaptive deficiency.

(F) Without making any particular diagnosis, it was concluded that Claimant would benefit from mental health services in order to improve his functioning in the home and at school.

8. (A) In May 2009, a few months before the AB 3632 assessment, Claimant underwent neuropsychological testing at UCLA as part of a research project there. Numerous test instruments were utilized.

(B) The WISC-IV was administered, and Claimant's full scale IQ was 80. There was some significant difference in the four subtest scores. Hence, his Verbal Comprehension Index, pertaining to his ability to reason with verbal information, was in the 37th percentile, and his score on the Working Memory Index fell into the 34th percentile. These are significantly higher than the overall score, which fell at the 9th percentile. That overall score was, apparently, dragged down by two low index scores. Claimant's Processing Speed Index, indicative of ability to complete cognitive tasks quickly, was rather low, falling in the 2nd percentile. At the same time, the Perceptual Reasoning Index, which reflects the ability to reason with nonverbal information, fell into the 8th percentile. (Ex. 8, p. 2.)

(C) Claimant was administered the Wide Rang Achievement Test, Third Edition (WRAT-III), to assess Claimant's academic skills. While his math results fell into the 9th percentile, spelling scores fell into the 32nd percentile, and reading and phonics fell into the 58th and 50th percentiles, respectively. (Ex. 8, pp. 2-3.)

(D) Results of the Vineland were depressed. Communication was at the fourth percentile, daily living skills at the first percentile, and social skills fell into the third percentile.

(E) Various other tests were performed, and discussed in the report, but they need not be reviewed herein. While the authors of the UCLA report pointed out that the testing was not for diagnostic purposes, and was part of a research project, it is clear that Claimant displayed some relative strengths, but significant weaknesses and limitations.

9. In recent years Claimant's behaviors have become more and more difficult to manage. For example, shortly before the hearing, he was caught shoplifting at a local WalMart. That was not his first shoplifting incident. He was recently placed on a "5150" psychiatric hold, or confinement, after he pulled a knife on his mother, and then turned it on himself. His school district recently suspended him for a third time, for fighting and stealing.

10. (A) Notwithstanding Claimant's maladaptive behaviors and low test scores, it can not be found that Claimant suffers from Mental Retardation.

(B) The Diagnostic and Statistical Manual IV, Text Revision, published by the American Psychiatric Association (hereafter DSM), is the most widely accepted source of diagnostic criteria for developmental disorders such as Mental Retardation and Autism. It teaches that the essential features of mental retardation are a significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM, p. 41.) "Significantly subaverage intelligence" is defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id.*) Put another way, "significantly subaverage" translates to IQ scores falling in the second percentile, or lower. It must also be noted that for a person to receive a diagnosis of mental retardation, the onset must occur before age 18.

(C) While Claimant has a low average IQ, his academic achievement, at least at the time of the UCLA testing, is equal to or it exceeds his IQ. Thus, while his IQ places him at the ninth percentile overall, three of the four areas tested were solidly average, and higher than might be expected. (See Factual Finding 8(C).) Such performance indicates that he is not cognitively impaired.

(D) Given Claimant's average IQ scores, which fall into the low average range, it cannot be found that Claimant has significantly subaverage general intellectual functioning, and therefore he can not be mentally retarded.

11. There has never been any indication that Claimant suffers from Cerebral Palsy or Epilepsy.

12. Likewise, there has not been any indication that he suffers from Autistic Disorder. To find that a person suffers from Autistic Disorder, the DSM requires that impairments in social interaction and communication be found, through examination of certain criteria, and there must also be evidence of restricted repetitive and stereotyped patterns of behavior, interests, and activities. There must be delays or abnormal functioning in social interaction, or language as used in social communication, or symbolic or imaginative play, before three years of age. Further, the disturbance must not be better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder. The diagnostic criteria lay out certain touchstones within each of the aforementioned areas, and the person in question must meet a number of the criteria; the symptoms must be significant.

13. None of the persons who have assessed Claimant have found that he suffers from, or even might suffer from, autism, and there is no other reliable evidence to support the notion that Claimant is autistic. Instead, it appears that his problems are mainly psychiatric.

## LEGAL CONCLUSIONS

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710.5, based on Factual Findings 1 through 3.

2. The Lanterman Act, at section 4512(a), defines developmental disabilities within the meaning of the Lanterman Act as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.”

This latter category is commonly known as “the fifth category.”

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR). At section 54000 the statutory definition of “developmental disability” is essentially reiterated. The developmental disability must originate before age eighteen, be likely to continue indefinitely, and constitute a substantial handicap for the individual.

(B) Under section 54000, subdivision (c), some conditions are excluded. They are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

4. (A) The regulations also speak to the definition of substantial disability. CCR section 54001(a) provides that,

“Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Communication skills;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

5. (A) Section 4642 provides, in pertinent part, that “any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers.” The statute defines initial intake to include the provision of information and advice about the nature of and availability of services that are provided by regional centers and “other agencies in the community.” Those other services might include mental health, housing, education, and vocational

training. The statute concludes by stating that “intake shall also include a decision to provide assessment.”

(B) The Service Agency provided an initial intake, as it reviewed records and provided information to Claimant’s mother. However, the decision was not to provide an assessment. Section 4642 may be read as making assessment optional, and not mandatory.

6. The Service Agency does not believe that Claimant suffers from a developmental disability, as that term is used in the Lanterman Act and its attendant regulations. That belief is reasonable given this record. Claimant’s IQ is average. While his adaptive function as indicated by the Vineland scores are at or near the second percentile, that alone is not sufficient to find mental retardation. Likewise, there is no evidence he suffers from autism. Instead, it appears that his condition flows solely from the pernicious effects of Fetal Alcohol Syndrome, which is not an eligible condition. In the main, his issues appear to be psychiatric, effectively barring access to services under the Lanterman Act, as Legal Conclusion 3 would indicate. Given that there is no evidence of an eligible developmental disability, the decision by the Service Agency not to provide assessment will not be set aside, on this record. Should information be developed in the future that might cause a change in the point of view, Claimant may apply for intake and assessment at that time.

## ORDER

The appeal of Claimant Jeffrey G. for assessment is hereby denied.

Dated: June 1, 2011

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

**THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.**